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CHARLES ELMORE CROPLEY

In the Supreme Court

of the United States

OCTOBER TERM, 1950

No. 467

STEBCO INCORPORATED, a corporation,
Petitioner,

v.

RUPERT L. GILLMOUTHE, Sheriff of Hood River County, Oregon,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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STEVENS-NESS LAW PUB. CO., PORTLAND 12-50

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TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Stebco Incorporated, a Washington corporation, respectfully prays that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Oregon, entered in the above-entitled suit on August 29, 1950. The decision sought to be reviewed denied peti-

tioner's prayer for a decree declaring certain *ad valorem* personal property taxes levied on sixty-four rafts of logs owned by petitioner to be illegal and void, and enjoining respondent, the county tax collector, from taking further action to collect said taxes. It reversed the decree of the Circuit Court of the State of Oregon for the County of Hood River which had granted to petitioner the relief prayed for in the complaint (R. 5).

During 1946 these rafts had been delivered at Lyle and Underwood, Washington, to a licensed towboat operator for transportation down the Columbia River to Vancouver, Washington. On tax day, January 1, 1947, they were in that part of the river which lies within the boundaries of Hood River County, Oregon.

The time within which to apply for a writ of certiorari herein has been extended to December 27, 1950, by order of Mr. Justice Douglas, entered on November 9, 1950 (R. 47).

OPINIONS BELOW

The decree of the trial court (R. 6-9) is not reported. The opinion of the Supreme Court of the State of Oregon (R. 32-45) is not yet printed in the official Oregon Reports but is reported at 221 P. (2d) 914.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3). The immunity under the commerce clause (Constitution of the United States, Article I, Section 8, Clause 3) of petitioner's sixty-four log rafts moving from Lyle and Underwood, Washington, to Vancouver, Washington, from the assessment and collection by the respondent of the Oregon personal property tax was first raised by the petitioner in the complaint (R. 4). The Circuit Court of the State of Oregon for the County of Hood River held that the State of Oregon and all its political subdivisions, including Hood River County, were and are prohibited by Article I, Section 8 of the Constitution from levying any tax of any kind, character or nature on said log rafts (R. 8). On appeal, the Supreme Court of the State of Oregon reversed the trial court's decree and held that the commerce clause did not insulate the log rafts from taxation upon the ground they had acquired a situs in Hood River County, Oregon, on tax day (R. 39-40).

QUESTIONS PRESENTED

1. Where a movement of personal property in interstate commerce is interrupted by temporary detention at an intermediate point, does the property acquire a local tax situs where it is continuously and exclusively in the possession and under the control of a common carrier, and where the break in transit results from in-

adequacy of the carrier's terminal facilities to accommodate the property at the point of destination?

2. In a case where the transportation of personal property in interstate commerce is actually intended and carried through, should not a liberal construction of the "continuity of the journey" be afforded to give the property owner a wide latitude in selecting a particular mode of transportation, which may involve temporary detention of the property in transit, without loss of the property's constitutional immunity from local taxation?

STATEMENT OF THE CASE

Petitioner sued respondent, sheriff and tax collector of Hood River County, Oregon, in the Circuit Court of the State of Oregon for the County of Hood River to void and set aside an assessment and levy of personal property taxes in the sum of $6,449.91 on sixty-four rafts of logs owned by petitioner, and to enjoin him from collecting said taxes. On tax day, January 1, 1947, these log rafts were in the coves on the Columbia River identified in the record as Herman's Creek and Kellogg's Cove (R. 20). They were within the boundaries of Hood River County, Oregon.

Some of the logs which comprised the rafts were cut near Lyle, Washington, and others were cut near Underwood, Washington. Both points are upstream and across the river from Herman's Creek and Kellogg's Cove (R. 11). These sixty-four rafts were a part of approximately two hundred rafts made up of 25,000,000 board feet of logs which the petitioner had purchased during 1946 for

manufacture into lumber at its mill located five miles downstream from Vancouver, Washington, and seventy miles or more from where the logs were rafted (R. 13-14, Exhibit II).

These logs were rafted at Underwood and Lyle as they were cut during the logging season from mid-April to mid-November, 1946, and from time to time during this period were delivered by petitioner to Esson Smith, a licensed towboat operator and common carrier, for transportation to his moorage at Vancouver, Washington (R. 12, 23). This moorage was capable of accommodating not more than thirty-six rafts at any one time (R. 25). When space was available, rafts "were towed straight through to their destination" (R. 13). When petitioner's milling schedule would not consume the rafts as fast as they were delivered to Smith, and when Smith's terminal facilities reached capacity, it became necessary for him to detain rafts en route pending availability of space at the Vancouver terminal. The sixty-four rafts in question were thus detained at the points where the tax was imposed.

On tax day, January 1, 1947, some of these rafts had been within the boundaries of Hood River County as long as seven months; others had been moored there less than two months (R. 35-36). With one exception, the longest time any raft was detained in Hood River County was approximately eleven months, the shortest period was two months (R. 35-36). All the rafts but one were delivered to Smith's Vancouver moorage less than four months after tax day; forty-three of the rafts arrived at Vancouver prior to March 1, 1947.

SPECIFICATION OF ERROR

In denying to petitioner's property in interstate commerce the immunity from local taxation afforded by the commerce clause of the Constitution of the United States, the Supreme Court of the State of Oregon has erred in deciding an important issue of constitutional law in a way which does not accord with the applicable decisions of this Court, including *Coe v. Errol,* 116 U.S. 517; *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366; *Hughes Bros. Timber Co. v. State of Minnesota,* 272 U.S. 469.

REASONS FOR THE ALLOWANCE OF THE WRIT

The logical result of the decision of the Supreme Court of the State of Oregon in this case is that local taxing authorities may levy a personal property tax on property which is in the custody and under the control of a common carrier, if it appears on tax day that the property is detained in the taxing jurisdiction, even though interstate transit of the goods is intended by the owner, and the detention is merely an incident of the particular mode of transportation used, as adapted to the needs of a particular economy.

Under the decision of the Supreme Court of the State of Oregon, goods in the possession of a railroad under a bill of lading could be subjected to a local *ad valorem*

tax if detained by the carrier at an intermediate point on an interstate journey because of the lack of adequate receiving facilities on the part of the carrier at the point of destination.

Therefore, this decision has a far-reaching impact upon the owners and carriers of property of all types. It marks a great extension of state taxing power and an unwarranted restriction upon immunity from local taxation afforded by the commerce clause. This case is of sufficient importance to require this Court to review the direct conflict between the asserted taxing power of Oregon and the paramount national interest in keeping interstate commerce unfettered by such local assessments.

ARGUMENT

The crucial question in this case is whether the "continuity of transit" of the sixty-four rafts in question was so interrupted by their presence within the boundaries of Hood River County, Oregon, as to give the property a tax situs in that county on January 1, 1947.

The petitioner's intention at all times that all the rafts be transported from Lyle and Underwood, Washington, to Vancouver, Washington, by common carrier, is conceded. It is also uncontroverted that all the rafts were ultimately delivered to their destination and that none was sold or in any way dealt with by petitioner while they were in transit. Petitioner bought logs, not for resale, but for manufacture into lumber.

The reason for the interruption of the journey and the detention of the rafts on the Columbia River, but within the boundaries of Hood River County, Oregon, was the lack of sufficient moorage facilities on the part of the carrier at the point of destination. The logs were cut and dumped in the river at Lyle and Underwood, Washington, during the regular seven-month logging season from mid-April to mid-November, 1946, but they were purchased by the petitioner for year-round consumption. The carrier's detention of the sixty-four rafts in Hood River County was no longer than necessary to adapt the particular transportation and terminal facilities used to the needs of the Columbia River logging and lumber economy, one end of which is engaged in continuous milling and the other in seasonal logging.

A storage of goods at an intermediate point during an interstate journey will break the continuity of transit where the owner retains or regains the power to divert the shipment from the ultimate interstate destination, for then there is no certainty that the shipment will continue in interstate commerce. However, this Court has recognized in numerous cases that after goods have been delivered to a common carrier for transportation in interstate commerce they are immune from local taxation (*Coe v. Errol,* 116 U.S. 517, 525; *Hughes Bros. Timber Co. v. State of Minnesota,* 272 U.S. 469, 475). The certainty that goods are in interstate commerce may normally be best evidenced by the fact that they have been delivered to a common carrier for that purpose (*Richfield Oil Corporation v. State Board of Equalization,* 329 U.S. 69, 82).

The evidence is undisputed that petitioner did not order the rafts to be stored in Hood River County, Oregon (R. 12). Smith testified that the only orders given him by petitioner were "to maintain a certain number of rafts in the Vancouver moorage so they can have a backlog to cut on" (R. 23). The record is clear that the adequacy of the carrier's terminal facilities and the method employed or time consumed by the carrier in transporting the rafts from Lyle and Underwood to Vancouver were matters of complete indifference to petitioner, whose only concern was the availability of not less than two rafts at all times at Smith's Vancouver moorage.

From the time Smith received the sixty-four rafts at Lyle and Underwood until their delivery at his moorage near Vancouver, Washington, they were exclusively in his possession and under his control. Petitioner had no right to divert these rafts in transit by selling them or by hauling them out of the water for shipment by rail. Such action would have been a breach of the contract of transportation.

The interstate shipment of petitioner's log rafts was completed to Vancouver, Washington, as adequate terminal facilities permitted the bringing of the rafts to that point. The interruption in transit was only an incident of the mode of transportation used, as adapted to the economy of the region and the needs of the industries affected. The record shows that the temporary detention in Hood River County, Oregon, of less than one-third of the total number of petitioner's rafts was reasonable and

in furtherance of the intended transportation (see *Hughes Bros. Timber Co. v. State of Minnesota,* 272 U.S. 469, 476). The reason for the delay was to promote the carrier's convenience in transporting the property and was necessary for the carrier's rendition of transportation services in the light of its inadequate receiving facilities at destination.

Accordingly, the decision of the Supreme Court of the State of Oregon rejecting petitioner's claim to local tax immunity conflicts with this Court's rule applying "a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through" (*Carson Petroleum Co. v. Vial,* 279 U.S. 95, 105-106).

The decision of the Supreme Court of the State of Oregon is directly contrary to the leading case of *Champlain Realty Co. v. City of Brattleboro,* 260 U.S. 366, where the taxpayer at all times retained control over the logs which this Court ruled were immune from local taxation in Vermont. In that case, the taxpayer floated logs from Vermont to New Hampshire. The boom at the destination, Hinsdale, New Hampshire, was incapable of holding all the logs when the water was high and the current swift. Therefore, the taxpayer detained the logs at its boom at Brattleboro, Vermont. This boom was constructed and used by the taxpayer as a substitute for more costly terminal facilities at Hinsdale. The logs could have continued their journey without delay had the New Hampshire boom been stronger or had other

facilities been provided to receive the logs at the destination. Thus, the cause of delay, as in the case at bar, was the lack of adequate receiving facilities at the end of the interstate journey. The fact that petitioner's sixty-four rafts were in the possession and under the control of a licensed towboat operator and common carrier makes the present case an even stronger case for tax immunity than the *Champlain Realty Co.* decision. As Mr. Chief Justice Taft stated in *Hughes Bros. Timber Company v. State of Minnesota,* 272 U.S. 469, 475: "Solution is easy when the shipment has been delivered to a carrier for a destination in another state."

In the *Champlain Realty Co.* case, this Court laid down five tests under which interstate continuity of transit must be determined (260 U.S. 366, 377): (1) intention of the owner; (2) the control he retains to change destination; (3) the agency by which the transit is effected; (4) the actual continuity of the transportation; and (5) the occasion or purpose of the interruption during which the tax is sought to be levied.

Judged by these factors, petitioner's rafts remained in interstate commerce.

(1) *Intention of the owner.* Petitioner's intention was to have the logs transported from Underwood and Lyle, Washington, via the Columbia River to Vancouver, Washington, and this intention was carried out by delivery of the logs to a common carrier for this purpose and by actual transportation of the logs by the carrier from the point of origin to their destination at Vancouver, Washington.

(2) *Control to change destination.* Petitioner delivered the logs to a common carrier for transportation to a fixed point. While no bills of lading were used and the contract between petitioner and the carrier was verbal, the arrangement did constitute a contract between the parties providing for transportation at rates agreed upon by the parties and approved by the Interstate Commerce Commission. Any attempt by petitioner to change the destination of the rafts would have been a breach of contract.

(3) *The agency by which the transit is effected.* The rafts were being transported by a common carrier and not by petitioner or by an agent of petitioner.

(4) *The actual continuity of the transportation.* Continuity of the transportation was merely interrupted. It was completed to the point of destination as soon as space there became available.

(5) *The occasion or purpose of the interruption during which tax is sought to be levied.* The occasion of the interruption was the lack of sufficient moorage space at the point of destination, a condition over which petitioner had no control. The purpose of the interruption was to provide a refuge for the logs until such time as transportation could be resumed. During the interruption the logs were not used by petitioner for any beneficial purpose of its own. There is no evidence in the record that during the time the rafts were in Hood River County any of them were scaled, re-rafted, sold, offered for sale or otherwise dealt with by petitioner. They were merely at rest there, unattended.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Supreme Court of the State of Oregon has decided a substantial question of constitutional law in conflict with the applicable decisions of this Court. The issue raised is of immediate importance to the timber and lumber industry which uses the long interstate Columbia River waterway as the most economical method of transporting logs to mills for manufacture into lumber. To allow the local taxing authorities of the states bordering on that river to burden that commerce where logs are being transported by common carrier is to make that commerce vulnerable to the very burdens and obstructions the commerce clause of the Constitution was designed to prevent.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF IN ANSWER TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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THE CASE

In this case there was no conflict as to facts. The defendant offered no testimony at the trial. The petitioner for certiorari to this Court, in its brief, suggests no erroneous finding as to facts.

The Supreme Court of Oregon simply held that where goods are turned over to a common carrier with instructions to store until needed at destination and to deliver them as needed and these instructions were given in the full knowledge that months of intermediate storage must result, that the goods, while so stored, were subject to taxation by the state of situs.

The Oregon Supreme Court decision in this case, *Stebco vs. Gillmouthe*, decided August 29, 1950 (Case No. 4734, Vol. 50 of Advance Sheets, No. 28, page 1147), sets forth fully the facts and no further statement is therefore deemed necessary.

AUTHORITIES

The editors of A.L.R. in Volume 110, page 724, assert the long established rule in relation to taxation of goods delayed in interstate shipment to be

> "Whether delays in interstate transit extending over three or more states will create a taxable situs in an intermediate state will largely depend upon the nature and duration of the delay—whether it is incident to the transportation of the property, or to accomplish some ulterior purpose of the owner not connected with such transportation."

The decision of the Oregon Supreme Court in this case in no way conflicts but merely declares the delay in shipment to be for the shipper's convenience. All the valuable citations are collected in the above mentioned A.L.R. note.

CONCLUSION

It is not the purpose of the constitutional provision against taxation of goods in interstate commerce to furnish a cloak permitting simple evasion of local taxation. The facts of this case amount simply to a storage after commencement of and before the end of an interstate shipment. Eight months was the average storage time of these logs rafts. Nobody questions that this storage was planned for and paid for by the plaintiff (petitioner herein). Plaintiff only claims it didn't know or care where the storage was accomplished.

Should petitioner's contention be sustained, a contract may be made to ship whiskey from Kentucky to New York, delivery to be made as a certain warehouse is emptied of other goods. By controlling the availability of storage facilities at destination a long intermediate storage, free of local taxation, can be arranged. The present rule, as above cited from A.L.R. prevents this.

The tests applied in *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, are unquestionably sound tests to be applied. Petitioner does not correctly apply them to this case, however, in the following particulars:

Intention of Owner and Occasion for Delay

Shipper intended no direct continuous shipment but required and arranged and paid for an eight months' delay in a 60 mile downstream shipment by towage. Shipper's logs had to be stored eight months before they

were needed or could be cared for at destination. This combined shipment and storage was the shipper's need and planned result. It included storage over tax day (Jan. 1) and hence included this claimed tax evasion.

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Petitioner cannot leave unchallenged respondent's statement that the interruption of the log transportation and the storage of rafts at intermediate points was intended, and prearranged and paid for, by petitioner. Respondent's brief states categorically that petitioner "intended no direct continuous shipment but required

and arranged and paid for an eight months' delay in a 60-mile downstream shipment by towage" (Res. Br. p. 3).

Respondent refers to no evidence as supporting this statement. Obviously the statement is based upon what is said in the opinion of the Supreme Court of Oregon on this subject. The Court said (R. 44):

> " . . . it was never intended that all of the rafts should move without pause from the place of origin to Smith's moorage at Vancouver. At the very outset it was agreed that the immediate destination of many of the rafts should be an intermediate moorage basin, to be selected by Smith."

There is no evidence in the record to support any such statement. The facts (as correctly summarized by the trial court, R. 7) are as follows:

Petitioner's arrangement with the towboat operator called for transportation from the point of shipment to destination, and for storage service *at the conclusion of the transportation* (R. 27-28). The towboat operator's moorage at the destination point was used as a storage depot and petitioner took logs therefrom, using another towing agency, as they were needed in its lumber manufacturing operations (R. 11, 17, 23, 24, 27).

This storage depot was used in the handling of logs for other concerns (R. 24). It became filled to capacity and the towboat operator, instead of enlarging it or arranging for other moorage in the vicinity, adopted the practice of delaying petitioner's log rafts at convenient points in both Washington and Oregon, between the

shipping point and destination. Petitioner learned of this practice but had nothing to do with its adoption or use (R. 12, 23, 24).

Petitioner paid the towboat operator only the transportation charge. No extra charge was made because of the detention in the coves in Hood River County, Oregon, of the rafts against which the taxes were levied (R. 23).

The tests applied in *Champlain Realty Co. v. Town of Brattleboro,* 260 U.S. 366, which respondent agrees are "unquestionably sound tests" (Res. Br. p. 3) are therefore applicable. The delay in the interstate transit was not intended "to accomplish some ulterior purpose of the owner not connected with such transportation," but was "incident to the transportation of the property." 110 A.L.R., p. 724.

Inland waterway transportation is not intended to be fast transportation. It is useful in the movement of commodities which may be delayed as the exigencies of the transportation agency may require. *Interstate Commerce Commission v. Mechling,* 330 U.S. 567, 570; *U. S. War Department v. A. & S. Ry. Co.,* 92 I.C.C. 528, 546.

Petitioner submits that the commerce clause of the Constitution forbids the taxation of interstate shipments merely because they are held at intermediate locations in the river by the transporting agency for its convenience.

The decision of the Supreme Court of the State of Oregon approving the taxation of petitioner's log rafts

is in conflict with the applicable rule laid down by this Court and should be reversed.

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